the premises in repair. The plaintiff, the child of a neighbor, whom the court assumed to be an invitee, was injured by reason of the disrepair of the tenant's premises. *Held*, that the plaintiff can recover. *Flood* v. *Pabst Brewing Co.*, 149 N. W. 489 (Wis.).

Apart from an express covenant to repair, a landlord owes no duty either to a tenant or a third party to take care that the demised premises are safe. *Lane* v. *Cox*, [1897] 1 Q. B. 415; *Mellen* v. *Morrill*, 126 Mass. 545. Nor does a covenant to repair, as a general rule, render the landlord liable, even to the tenant, for personal injuries resulting from the want of repair. He is not liable in tort because it is a mere nonfeasance, nor in contract because the damages are said to be too remote. *Tuttle* v. *Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *Dustin* v. *Curtis*, 74 N. H. 266, 67 Atl. 220; *Schick* v. *Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962. Third parties, of course, cannot sue on the contract as such. *Cavalier* v. *Pope*, [1906] A. C. 428; see *Burdick* v. *Cheadle*, 26 Oh. St. 393, 397. It is also generally held that strangers cannot recover from the landlord in tort by showing merely a breach of the contract to repair. *Frank* v. *Mandel*, 76 N. Y. App. Div. 413, 78 N. Y. Supp. 855; see *Shackford* v. *Coffin*, 95 Me. 69, 49 Atl. 57; *Burdick* v. *Cheadle*, *supra*. A recent Kentucky case reaches this result. *Dice's Adm'r* v. *Zweigart's Adm'r*, 171 S. W. 195. Some jurisdictions, however, allow a recovery on the theory of preventing circuity of action. See *Lowell* v. *Spaulding*, 4 Cush. (Mass.) 277, 279. This view seems to be untenable where the tenant cannot recover in contract from his landlord the damages collected from him by the injured third party, because of the remoteness of the damage. *Schick* v. *Fleischhauer*, *supra*. Other jurisdictions allow an invitee of the tenant to recover in tort on what is conceived to be an affirmative duty of due care to make the premises safe, arising out of the contract. This is the reasoning of the principal case. *Barron* v. *Liedloff*, 95 Minn. 474, 104 N. W. 289; *Mesher* v. *Osborne*, 75 Wash. 439, 134 Pac. 1092. These cases seem unsupportable, since they confuse the liability arising from a breach of a duty imposed by law with a duty assumed by contract. See *Dustin* v. *Curtis*, 74 N. H. 266, 269, 67 Atl. 220. *Cf. Miles* v. *Janvrin*, 196 Mass. 431, 82 N. E. 708.

MECHANICS' LIENS — WAIVER OF LIEN BY CONTRACT BETWEEN MATERIALMAN AND CONTRACTOR. — By a written agreement between a materialman and the contractor, the materialman agreed not to assert his right to a mechanics' lien upon a building being erected for the defendant by the contractor. The defendant had paid the contractor more than was proper in view of the claims of materialmen, but did not learn of this agreement until suit was brought by the materialman to enforce his lien. *Held*, that the agreement did not constitute a waiver of the lien. *Massachusetts Bonding & Ins. Co.* v. *Realty Trust Co.*, 83 S. E. 210 (Ga.).

In the absence of estoppel, the question whether the materialman has waived his right to a lien is one of intention. *Johnson* v. *Spencer*, 49 Ind. App. 166, 96 N. E. 1041; *Lee* v. *Hassett*, 39 Mo. App. 67. This may be shown by acts inconsistent with the existence of a lien. *Green* v. *Fox*, 7 Allen (Mass.) 85. Or the materialman may waive his right by a contract with the owner. *Murray* v. *Earle*, 13 S. C. 87. But where there is merely a contract between the materialman and the contractor, as in the principal case, the owner is but incidentally benefited, and can take no advantage of the contract. Although there is an intention by the materialman to waive his lien, it would seem that it must run to the owner in order to be binding upon him as a waiver.

NEGLIGENCE — DUTY OF CARE — EFFECT OF VIOLATION OF STATUTE PROHIBITING THE EMPLOYMENT OF MINORS IN ELEVATORS. — The plaintiff's intestate, a boy less than eighteen years old, was allowed to run an elevator in

the defendant's department store, in violation of a statute which made it a misdemeanor to employ or allow persons under eighteen to operate elevators. While so engaged, he was crushed to death. *Held*, that the plaintiff can recover. *Beaver* v. *Mason, Ehrman & Co.*, 143 Pac. 1000 (Ore.).

The decision takes the ground that the violation of the statute by the defendant was the equivalent of negligence, and is undoubtedly sound. The statute was designed to prevent just such accidents as the one that occurred. Though the point is not discussed, the case also involves a decision that the boy's part in the violation of the statute does not bar the recovery, for the statute was designed to protect persons in his position, not to punish them, and its policy is such that any assumption of risk by the persons within its purview is forbidden. This follows the accepted view. *Berdos* v. *Tremont & Suffolk Mills*, 209 Mass. 489, 95 N. E. 876. For an extensive discussion of the principles involved in the case, see Dean Thayer's article on Public Wrong and Private Action, 27 HARV. L. REV. 317; see also 26 HARV. L. REV. 262.

NEW TRIAL — TIME WITHIN WHICH MOTION MUST BE MADE — EFFECT OF EXPIRATION OF TERM. — In a criminal proceeding, the defendant was convicted, and judgment entered. After the expiration of the term, it was discovered that one of the jurymen who served at the trial had been prejudiced against the defendant. This discovery could not have been previously made by the exercise of reasonable diligence. *Held*, that a new trial cannot be granted. *United States* v. *Mayer*, 235 U. S. 55.

For a discussion of the effect of the expiration of the term on a party's right to a new trial, see p. 412 of this issue of the REVIEW.

POWERS — NON-EXCLUSIVE POWERS — DOCTRINE OF ILLUSORY APPOINTMENTS IN UNITED STATES. — The testator devised land in trust for his son for life, with power to convey to his children "in such shares and proportions among them as he by his last will" should appoint, and in default of appointment to the children in equal shares. The donee of the power by his will gave ten dollars apiece to five of his seven children and the remainder of the proceeds of his real estate to the other two. He possessed no other real estate than that subject to the power. *Held*, that the will was a valid exercise of the power. *Crawford's Estate*, 62 Pitts. L. J. 536 (Orphan's Ct., Alleghany Co., Pa.).

Ever since the adoption of the modern rule allowing after-acquired realty to pass by will, general words of devise have been insufficient to exercise a special power of appointment, even though at the date of the will the testator had no other property than that subject to the power. *In re Mills*, 34 Ch. D. 186. A Pennsylvania statute, however, has established the contrary rule. See *Aubert's Appeal*, 109 Pa. St. 447. Even under this statute the court would have been forced to hold the appointment invalid if it had applied the doctrine of illusory appointments introduced by the English equity court, which required the donee of a non-exclusive power to appoint to each of the class a substantial portion of the property. *Kemp* v. *Kemp*, 5 Ves. 849. England, however, repudiated this doctrine by a statute which provided that a non-exclusive power was validly exercised as long as each member of the class received some of the property, no matter how small a share. 11 GEO. IV. & 1 WM. IV., c. 46. A later statute removed this formal requirement and made non-exclusive powers equivalent to exclusive powers. 37 & 38 VICT., c. 37. In America, a few jurisdictions have recognized the doctrine of illusory appointments. *Thrasher* v. *Ballard*, 35 W. Va. 524. See 1 TIFFANY, REAL PROPERTY, § 288. But several other states in which the question has arisen, among them Pennsylvania, have wisely refused to adopt as a part of the common law a rule which proved so inadvisable in practice that it was long ago discarded by its creators. See *Graeff* v. *De Turk*, 44 Pa. St. 527; *Lines* v.